Supreme Court, U.S.
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NO. 95-1198

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NOEL D. McNEEL, JOYCE A. McNEEL
GLEN NIGHTENGALE, RUBY NIGHTENGALE

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

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The Petitioners hereby reply in support of their Petition for Writ of Certiorari. For the reasons set forth therein and in this Reply, this Court should issue the Writ to the Ninth Circuit Court of Appeals.

The Respondent has waived her right to respond to the Petition. Therefor she admits that, in affirming the Tax Court's grant of a Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted, the Ninth Circuit found facts outside and contrary to the pleadings. The Ninth Circuit found that the Petitioners received Wages and that they worked for employers. These facts found by the Ninth Circuit resulted in a legal conclusion applicable to those facts, but which the Petitioners submit were contrary to the issue on appeal.

By waiving her right to respond to the Petition, the Respondent cannot dispute that the Ninth Circuit's decision was made in a way that conflicts with the relevant decisions of this Court. The facts plead in the Tax Court Petition were not challenged in any other way (by way of summary judgment, for example) this court must assume they are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), citing *Lucas v. South Carolina Coastal Council*, 506 US _____, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). Given that presumption and this Court's standard of review, it is clear that it was inappropriate for the Ninth Circuit to have affirmed the Tax Court's grant of the Motion to Dismiss, and in doing so, to have ignored the facts plead in the Petition, to have found facts that were not otherwise plead or that could not be inferred from the pleadings and to have found facts that were contrary to the facts alleged in the Tax Court Petition.

Additionally, in finding those facts, the Ninth Circuit avoided the primary issue of whether the Petitioners'

labor, which is indisputably received as a gift from their Creator, is a "gift for income tax purposes." This Court has held that whether there has been a gift for income tax purposes is a question of fact, to be decided by the trier of fact. *Commissioner v. Duberstein*, 363 US 278, 285, 289-91, 4 L.Ed. 1218, 80 S.Ct. 1150 (1960). By failing to proceed on the facts plead in the Tax Court Petition, the Ninth Circuit decided this matter as a question of law, which is in a way that conflicts with *Duberstein*, supra.

Rule 10, Rules of the Supreme Court of the United States, states, in part: "Review on a writ of certiorari is not a matter of right, but of judicial discretion." However, that discretion is not unbridled and not so broad as to give the Court the authority to ignore Petitions that fall within the very stated reasons in Rule 10(a), (b), and (c), Rules of the Supreme Court of the United States. cf. *United States v. Rogers*, 461 US 677, 709, 76 L.Ed.2d 236, 103 S.Ct. 2132 (1983)

> To say that district courts need not always go ahead with a forced sale authorized by § 7403[1] is not to say that they have unbridled discretion. We can think of virtually no circumstances, for example, in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.

By analogy, to say that the Supreme Court need not always exercise its discretion in granting a Writ of Certiorari is not to say that the Court has unbridled discretion. There should be virtually no circumstances in which it would be permissible to refuse to grant Certiorari where an appellate court blatantly violates its

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1/ Referring to § 7403 of the Internal Revenue Code.

own standards of review that are clearly in conflict with this Court's own standards and previous decisions, particularly when the appellate court does so in the name of protecting the revenue taxation system. If it takes this kind of blatant violation to protect the revenue taxation system, then it can only be concluded that the system was never intended to be enforced in the manner that the lower courts are so vehemently attempting to protect, knowing that this Court only grants certiorari two or three percent of the time and even less when the case involves substantive claims against the Internal Revenue Laws. At some point discretion must end and mandate begin. This is one such time.

Accordingly, and for the foregoing reasons, this Court should grant the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16 day of February, 1996.

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